IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 109 OF 1995

The State of Maharashtra
(at the instnace of Shri.
Hiralal Tiwari, RPF ASI
Nandgaon, for RPF Nandgaon) ...Appellant.

Versus

1. Babu @ Babya Haidar Shaikh,
R/o. Gulzar Wadi,
Nandgaon, Tq. Nandgaon,
Dist. Nasik.

2. Hussain Saiyad Noor,
R/o. Gulzar Wadi,
Nandgaon, Tq. Nandgaon,
Dist. Nasik.

3. Govindji Samji Shaha,
R/o. Near Laxmi Talkies ...Respondent.
Nandgaon, Tq. Nandgaon, (Ori. accused
District Nasik Nos.1, 3 & 5)

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Shri. A.S. Shitole, A.P.P. for Appellant.

Mr. Sudhakar Thorat for respondent No.3

None for respondent Nos. 1 and 2 though served.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 19TH OCTOBER, 2004

ORAL JUDGMENT:-

1. Through this appeal, the appellant i.e. the State of Maharashtra challenges the judgment and order dated 4.10.1994 passed by the learned

J.M.F.C. (Railways) Manmad, District Nasik in Regular case No.127/83. By the said judgment and order, the learned Magistrate acquitted the respondent Nos. 1 to 3 i.e. original accused Nos. 1, 3 and 5 of the offence under Section 3(a) of the Railway Property Unlawful Possession Act, 1966, (hereinafter referred to as the "said Act" for the sake of brevity).

2. Briefly stated the prosecution case is as under:-

. The respondent No.1 i.e. original accused No.1 Babu @ Babya Haidar Shaikh was arrested by R.P.F. in Crime No. 47/82. He was interrogated in the said crime and he has admitted that 15 days ago he alongwith original accused No.2 (absconding accused), original accused No.3 Hussain Noor (appellant No.2) and original accused No.4 Balya Abaji, unloaded 13 tin sheets from a railway wagon and sold the same to respondent No.3 i.e. original accused No.5 Govindji Samji Shaha. Hence, confessional statement of accused No.1 Babu Shaikh was recorded by R.P.F. personnel. Pursuant to the statement made by respondent No.1 Babu Shaikh, the R.P.F. personnel alongwith accused Babu Shaikh went to the godown of accused No.5 Govindji Shaha. Accused No.5 Govindji Shaha produced 13 tin sheets

which he had purchased. The said tin sheets came to be seized under panchanama. As according to the I.O. there was sufficient evidence against the original accused Nos. 1 to 5, he submitted the complaint in the Court for trial of all accused for the offence punishable under Section 3(a) of the said Act.

3. The trial of original accused No. 2 and original accused No. 4 Balya Abaji came to be separated and the trial proceeded only against the original accused Nos. 1, 3 and 5 i.e. the present respondents. The charge (Exh.49) came to be framed against them for the offence punishable under Section 3(a) of the said Act. The charge was read over to all the three accused. They pleaded not guilty and claimed to be tried. The defence of the accused is that of total denial. In addition thereto, the defence of the accused No.5 is that he owned some tin sheets which he purchased from Bombay and the R.P.F. personnel took the said tin sheets from him and falsely implicated him in this case.

4. The prosecution examined in all seven witnesses in the present case. P.W.1 Hiralal Chunilal is the Enquiry Officer, P.W.2 Prakashchand Shrivastav is the foreman of Railway, who was at the relevant

time i.e. on 28.9.1982 working at New Goods Shed Mulund. He had unloaded Wagon No. NR 52906 of Bakoro Steel Plant to New Goods Shed Mulund. He suspected shortage in the tin sheets. On wieghment, he found 2670 Kgs short and he informed this fact to R.P.F. P.W.3 Damodar Baburao was working as S.I. R.P.F. at Mulund. He was informed of the shortage of tin sheets in the said Wagon. P.W.4 Shrikrushna Moon recorded the confessional statement (Exh.9) of respondent No.1 Babu Shaikh. P.W.5 Prabhakar Choudhari has deposed about the confessional statement made by respondent No.2 Hussain Noor. P.W.6 Shivram Bhavar who is a police constable was posted at Nandgaon City police station. P.W.7 Bhaskar Sonwane was the Chief Trains Clerk, his evidence does not help the prosecution in any manner. After going through the evidence adduced by the prosecution, the learned Magistrate acquitted the respondents as stated in para 1 above. Hence, this appeal.

5. I have heard Shri. Shitole, the learned A.P.P. for the appellant-State and Shri. Thorat for respondent No.3. None for the respondent Nos. 1 and 2 though served. I have also perused the entire record of this case including the judgment and order of the learned Magistrate. I am implicitly satisfied that the view of acquittal was

not only a possible view but a plausible one.

6. For proving the case the prosecution has to prove that;

a. the accused were in possession of seized properties;

b. The property was Railway property;

c. The property was suspected to be stolen or unlawfully obtained.

. The prosecution case is mainly founded on the confessional statement of respondent Nos. 1 and 2 and the recovery of 13 tin sheets from respondent No.3. As far as the confessional statement (Exh.9) of respondent No.1 Babu Shaikh and confessional statement (Exh.13) of respondent No.2 Hussain Noor are concerned, the prosecution witnesses i.e. P.W.1 Hiralal Chunnilal, P.W.4 Shrikrushna Noor and P.W.5 Prabhakar Choudhari have failed to depose that these accused persons voluntarily made such statements. The statement of respondent No.1 Babu

Shaikh and respondent No.2 Hussain Noor were allegedly recorded by P.W.1 Hiralal Chunnilal. However, he also failed to depose that Babu Shaikh and Hussain Noor voluntarily made these confessional statements. The statements were made in the presence of P.W.4 Shrikrushna Noor and P.W.5 Prabhakar Choudhari, however, all these three witnesses i.e. P.W.1 Hiralal Chunnilal, P.W.4 Shrikrushna Noor and P.W.5 Prabhakar Choudhari have failed to depose that the statements were read over to the concerned accused and that concerned accused admitted it to be correctly recorded. These witnesses also failed to depose that the concerned accused made such statement voluntarily. They have further failed to depose that there was no inducement or pressure applied on the accused. In such circumstance, the view of the learned Magistrate that these confessional statements cannot be relied upon is a possible view.

7. The other circumstance is the recovery of tin sheets at the instance of respondent No.1 from respondent No.3. In this connection, it is pertinent to note that none of the panchas have been examined by the prosecution. The memorandum of panchanama of respondent No.1 was recorded in presence of P.W.1 Hiralal Chunnilal and P.W.4 Shrikishana Moon. P.W.1 Hiralal Chunnilal has

deposed that he recorded the memorandum panchanama (Exh.10) which led to the discovery with the assistance of police. However, P.W.4 Sub Inspector Shrikishana Noor states to the contrary. P.W.4 Shrikrishna Noor has deposed that after recording Exh.10 police help was sought. This shows that the Exh.10 was not recorded by the R.P.F. personnel in presence of police. Though, P.W.6 Police constable Shivram Bhavar put his signatures on Exh.10 none of these three witnesses i.e. P.W.1 Hiralal Chunnilal, P.W.4 Shrikrishna Moon and P.W.6 Shivram Bhavar have deposed as to what was the actual words stated by respondent No.1 at the time of recording of Exh.10. As stated earlier though Exh.10 was recorded in presence of panchas, none of the panchas have been examined by the prosecution. All these facts raise doubt in the mind whether the respondent No.1 actually made such a statement.

8. In respect of tin sheets which were recovered from respondent No.3 Govindji Shaha, Enquiry Officer P.W.1 Hiralal Chunilal has deposed that he alongwith R.P.F. Sub Inspector Shri. Shrikrishna Moon (P.W.4), accused Babu Shaikh and police constable went to the house of respondent No.3 Shri. Shaha. P.W.1 Hiralal Chunilal has further deposed that he inspected the godown of respondent No.3 Shaha. Respondent No.1 Babu Shaikh pointed

out the tin sheets sold by him to respondent No.3. However, the evidence of P.W.4 Shrikrishna Moon and P.W.6 Police Constable Shivram Bhavar is to the contrary. Both P.W.4 and P.W.6 have deposed that they have not inspected the godown but it was the respondent No.3 Govind Shaha himself who brought the tin sheets from godown and produced them. In view of this evidence, it is doubtful whether the tin sheets were discovered at the instance of respondent No.1 Babu Shaikh. In fact the respondent No.3 Govind Shaha has admitted that he gave tin sheets to R.P.F. personnel. However, respondent No.3 Govind Shaha was not arrested immediately on 11.11.82 but was arrested after long gap i.e. on 29.4.83, all this create doubts as to the fact whether Enquiry Officer really seized the tin sheets that too at the instance of respondent No.1 Babu Shaikh. In the facts of the present case, it cannot be said that the respondent No.1 Babu Shaikh was in the possession of tin sheets. However, as the respondent No.3 Govindji Shah himself admitted that he delivered such tin sheets to R.P.F. personnel it would have held that he was in possession of the tin sheets.

9. The prosecution case is that said wagon stopped at Nandgaon railway station when accused committed theft. Nothing is brought on record to show that

the said wagon passed through Nandgaon or stopped there on 25.9.1982. According to prosecution, all the goods stolen by original accused Nos. 1 to 4 were recovered but seized tin sheets do not appear to weigh about 2670 Kgs., which was found short. Admittedly, the said wagon was roofless and therefore, it cannot be ruled out that theft took place at other places by other persons.

10. The prosecution failed to bring on record, the size weight and quality of tin sheets which were despatched from Bokaro in that wagon. Therefore, there is nothing on record to show that seized tin sheets and stolen tin sheets are same. Admittedly no special marks were found on seized tin sheets so as to conclude that they were stolen from the railway wagon in question. This is a vital lapse on the part of prosecution. I have also observed earlier that the confessional statements of respondent Nos. 1 and 2 which are at Exh. 9 and 13 were not made voluntarily. Thus, the prosecution failed to prove that seized properties are railway properties. The prosecution also failed to prove that the property was suspected to be stolen or unlawfully obtained by accused No.5 Govindji Shaha.

11. It is well settled that the view of acquittal

could have been reasonably arrived at then the mere circumstance that the appellate Court could have taken a different view would be no ground to interfere. In this connection, there is no dearth of authorities but to eschew prolixity, I am only referring to one of them i.e. **AIR 1971 SC 66 Khedu Mohton and Ors. Vs. State of Bihar.** In my view, the view of acquittal was a reasonable and a possible view.

12. Apart from this, the fact cannot be lost sight of that the impugned order of acquittal was passed more than 10 years ago. I feel in petty cases like the instant one which deals with the theft of 13 tin sheets, on account of efflux of time also, it would not be proper to disturb the order of acquittal.

13. In the circumstances, I find no merit in this appeal. Criminal appeal is dismissed.